## ..... THE BAD

- **CABLE OPERATORS SHOULD BE ABLE TO DESIGNATE WHICH DISTANT SIGNAL FEE A LOCAL STATION SHOULD PAY AS REIMBURSEMENT OF DISTANT COPYRIGHT ROYALTIES.**[58]

This is yet another means by which cable systems could hold up stations and discourage their carriage. Again, it flouts the Act's intent and reintroduces the cable operator as algerine -- something Congress wished to end once and for all.

If anything, the Commission should make it plain at the outset that it will not tolerate a "fun-with-numbers" approach to calculating proper reimbursement. The Commission, for example, should indicate that in the event of disputes, it will direct that distant signal royalties be calculated on a chronological basis. In other words, in a major market, the first three distant signals carried would pay at the normal rate. Later added signals would be allocated the higher 3.75% rate.

Again, INTV would hope disputes are few and far between. Nonetheless, many disputes can be avoided if the Commission leaves no doubt that it will apply objective criteria if disputes arise.

## .....AND THE UGLY

- **CABLE OPERATORS SHOULD BE PERMITTED TO INSIST ON PAYMENT IN ADVANCE FROM BROADCASTERS.**[59]

Permitting cable operators to require advance payment contravenes the express terms of the Act. Section 614 (h)(1)(B)(ii) excludes a copyright distant station

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[58]TW at 12.

[59]NCTA at 11.

from the definition of local only "if such station does not *agree to indemnify* the cable operator from any increased copyright liability...."[emphasis supplied]. Thus, once a station agrees to indemnify the system, the exclusion no longer applies.

Advance payment also may be impractical. Royalties are paid at the end of each semi-annual royalty period.[60] Therefore, they cannot even be calculated, much less paid, in advance.

Furthermore, non-payment is a matter for local courts. If a station fails to abide by its agreement to reimburse the system, then the cable operator can sue to enforce the agreement, just as it would with any other debtor of the system.[61]

Therefore, the Commission should honor the express language of the Act, leave reimbursement agreements to the parties and the courts, and adopt no rule permitting cable systems to require advance payment.

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[60]17 U.S.C. §111(d)(1)(A).

[61]In the case of a station which has sought protection under the bankruptcy laws, the automatic stay provision would prevent the cable operator from deleting the signal without approval of the bankruptcy court. Even then, the cable operator would stand in the same position as other unsecured creditors.

# EFFECT ON NETWORK AND SYNDICATED PROGRAM EXCLUSIVITY RIGHTS

## THE GOOD

- NETWORK AND SYNDICATED PROGRAM EXCLUSIVITY RIGHTS ARE UNAFFECTED BY THE MUST CARRY PROVISIONS OF THE CABLE ACT.

## ..... THE BAD

- NETWORK AND SYNDICATED PROGRAM EXCLUSIVITY PROTECTION RIGHTS SHOULD NOT BE EXERCISED AGAINST MUST CARRY SIGNALS.

- STATIONS WHICH ARE NOT CARRIED SHOULD BE BARRED FORM ASSERTING NETWORK OR SYNDICATED EXCLUSIVITY RIGHTS.

## .....AND THE UGLY

- STATIONS ELECTING RETRANSMISSION CONSENT SHOULD BE BARRED FROM ASSERTING NETWORK OR SYNDICATED EXCLUSIVITY RIGHTS.

The goodness, badness, and ugliness of the above propositions are established in INTV's Comments and need not be belabored here.[62] Suffice it to say, the Act has no effect on the application of the Commission's exclusivity rules -- something perfectly clear from the Act and its legislative history.

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[62]INTV at 12-13.

# EFFECT OF PROGRAM LICENSING AGREEMENTS ON RETRANSMISSION CONSENT

## THE GOOD

- **PROGRAM LICENSE AGREEMENTS HAVE NO EFFECT ON A STATION'S ABILITY TO GRANT RETRANSMISSION CONSENT TO A CABLE SYSTEM.**

The comments reveal remarkable agreement between broadcasters and cable operators on this point,[63] the notable exception being a broadcaster and a cable operator which also own film studios.[64] Surprise, surprise!

The Commission must focus on the real effect of its pronouncements on this critical point. If program suppliers can prevent stations using their programs from granting retransmission consent, then the retransmission consent provision of the law and the current cable compulsory copyright license will be written out of existence. In the worst case, all stations would be forced to elect must carry, and distant signal carriage would cease -- because enough program suppliers refused to permit stations to grant retransmission consent or demand exorbitant compensation from stations for that right.

Congress did not intend to establish retransmission consent as an illusory right. In whatever manner Congress may have expressed itself, it never could have intended to place control of signal carriage into the hands of program suppliers and in so doing undo all it had tried to accomplish in the Act's signal carriage provisions.

If the Commission embraces the bad and the ugly interpretations set forth below, the entire statutory framework will implode. Meanwhile, the Commission

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[63] *E.g.*, INTV at18; TCI at 30.

[64] TW at 55; Fox at 5, Viacom at 51

will be left to grace the moniker "Terminator" with respect to retransmission consent as a viable option for broadcast stations.[65]

## ..... THE BAD

- PROGRAM LICENSE AGREEMENTS MAY GOVERN THE GRANT OF RETRANSMISSION CONSENT RIGHTS BY BROADCAST STATIONS.[66]

- PROGRAM COPYRIGHT HOLDERS MAY PREVENT STATIONS FROM ELECTING OR GRANTING RETRANSMISSION CONSENT.[67]

## .....AND THE UGLY

- STATIONS ELECTING RETRANSMISSION CONSENT MUST CERTIFY TO CABLE SYSTEMS THAT THEY HAVE THE AUTHORITY TO GRANT CONSENT TO A CABLE SYSTEM.[68]

- A STATION MAY NOT GRANT RETRANSMISSION CONSENT WITHOUT SPECIFIC AUTHORIZATION OF PROGRAM COPYRIGHT LICENSORS.[69]

- THE COPYRIGHT OFFICE'S VIEW THAT RETRANSMISSION CONSENT IS THE SAME AS COPYRIGHT.[70]

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[65]As for the Copyright Office's attempt to equate retransmission consent with copyright, INTV can only note, again, that Congress has concluded otherwise and remind the Commission that the Copyright Office is an arm of Congress, not *vice versa!*

[66]TW at 55; Comments of the Motion Picture Association of America, MM Docket No. 92-259 (filed January 4, 1992) at 14 [hereinafter cited as "ACC"].MPAA at 3.

[67]© at 14.

[68]Viacom at 49.

[69]Viacom at 51.

[70]© at 8.

# MUST CARRY IMPLEMENTATION

## THE GOOD

- **SIMPLE! APPLY THE LAW AS WRITTEN AND INTENDED BY CONGRESS, *TO WIT*:**

  The Committee...anticipates that the FCC will undertake to promulgate regulations which will permit the fullest applications of whichever rights each television station elects to exercise.[71]

## ..... THE BAD

- **THE LAW DOES NOT APPLY TO "COMMERCIAL" SUBSCRIBERS TO CABLE SYSTEMS[72].**

Says who? Certainly not Congress. This is wishful thinking by cable operators, a product of the loophole mentality which permeates their approach to the law. Congress drafted a balanced requirement with deliberate exceptions for exceptional circumstances. No such exception exists for "commercial" subscribers.

In the absence of a statutory exception, the Commission must examine compliance problems via the waiver and special relief processes, not via an exception becomes the rule approach.

## .....AND THE UGLY

- **CABLE OPERATORS SHOULD IMPLEMENT THE LAW AS THEY SEE FIT, PROVIDED THEIR ACTIONS ARE NOT ARBITRARY AND CAPRICIOUS.[73]**

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[71]Senate Report at 38.

[72]Continental at 15.

[73]TCI at 26.

Talk about wishful thinking. Anticompetitive effects, what Congress is trying to prevent, rarely are the product of arbitrary or capricious action. Indeed, anticompetitive acts are typically quite deliberate and quite calculated to have just the effect they have on competitors and competition.

Moreover, for the umpteenth time, Congress has determined to replace cable operator discretion with the rule of law. As much as cable operators may not like it, it is the law!

- **IF A STATION FAILS TO NOTIFY A CABLE SYSTEM OF ITS ELECTION, THE CABLE OPERATOR MAY DECIDE THE STATION'S ELECTION FOR ITS SYSTEM.**

INTV must respectfully decline this gracious offer to let cable operators unburden independent stations of such difficult decisions.

## RETRANSMISSION CONSENT IMPLEMENTATION

### THE GOOD

- **CARRIAGE OF STATIONS UNDER RETRANSMISSION CONSENT MUST NOT INTERFERE WITH CARRIAGE OF MUST CARRY STATIONS.**

Why? Because Congress said so! Section 325(B)(5) states:

> The exercise by a television broadcast station of the right to grant retransmission consent under this subsection shall not interfere with or supersede the rights under section 614 or 615 of any station electing to assert the right to signal carriage under that section.

There, that seems to resolve the matter neatly.

## ..... THE BAD

- **SMALL CABLE SYSTEMS SHOULD BE ENTITLED TO MOST FAVORED SYSTEM TERMS FOR RETRANSMISSION CONSENT.**

And UHF stations should get double the rate they bargain for! Anyway, the Commission may look at all this in its rate regulation proceeding. Suffice it to say, in the absence of a demonstrable problem or sound reasons to predict problems will occur, no regulatory response is called for.

- **THE COMMISSION SHOULD PROHIBIT STATIONS FROM UNREASONABLY REFUSING TO GRANT RETRANSMISSION CONSENT.**

One more time: Suffice it to say, in the absence of a demonstrable problem or sound reasons to predict problems will occur, no regulatory response is called for.

- **THE COMMISSION SHOULD FORBID STATIONS FROM ENTERING INTO EXCLUSIVE RETRANSMISSION CONSENT AGREEMENTS WITH CABLE SYSTEMS**

Yet again: Suffice it to say, in the absence of a demonstrable problem or sound reasons to predict problems will occur, no regulatory response is called for.

## .....AND THE UGLY

- **THE COMMISSION SHOULD REGULATE THE RATES CHARGED BY STATIONS FOR RETRANSMISSION CONSENT.**

At risk of repetition -- the Commission may look at all this in its rate regulation proceeding. Suffice it to say, in the absence of a demonstrable problem or sound reasons to predict problems will occur, no regulatory response is called for.

# IMPLEMENTATION SCHEDULE

## THE GOOD

- **STATIONS SHOULD BE ALLOWED "INTERIM" ELECTIONS IF CABLE SYSTEMS MERGE OR THE STATION BECOMES A POTENTIAL MUST CARRY STATION FOR THE FIRST TIME.**[74]

INTV agrees that if a station gains new rights on a cable system, it should be entitled to make an election as between must carry and retransmission consent.

## ..... THE BAD

- **THE EFFECTIVE DATE OF MUST CARRY SHOULD BE OCTOBER 6, 1993.**[75]

No reason exists to delay must carry. INTV does recognize, however, that cable systems may need to revise their channel line ups as late as October 6 to comply fully with the law. This may justify some grace period in enforcement of the channel positioning (as opposed to the carriage) requirement. In any event, full compliance with all signal carriage requirements must be required by October 6, 1993, at the latest.

- **STATIONS MUST MAKE THEIR ELECTIONS BY APRIL 1 FOR THREE YEAR CYCLES BEGINNING IN 1996.**

This is too early. Again, INTV has proposed a three year adjustment in county ADI assignments and in §76.51. No election should be required until these adjustments are made.

## .....AND THE UGLY

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[74]TCI at 41.

[75]NCTA at

- **THE MUST CARRY REQUIREMENTS SHOULD NOT BE EFFECTIVE UNTIL JANUARY 1, 1994.**

This is unnecessarily late. To the extent it is a function of copyright accounting periods, INTV reminds the Commission that for most signal carriage at issue no payments will be required because they are local signals. To the extent royalty payments may be required, they are subject to reimbursement for must carry stations and negotiation for retransmission consent stations. Thus, while a valid consideration, consistency with copyright payment periods need not be the tail that wags the dog.

## TECHNICAL CARRIAGE REQUIREMENTS

### THE GOOD

- **CABLE SYSTEMS SHOULD CARRY SID CODES.**

A.C. Nielsen notes the significance of rating related codes to its task of providing audience estimates. Such codes are program related and should not be subject to deletion by cable operators. Needless to say, the significance of audience rating estimates to broadcast stations and cable systems alike cannot be overstated.

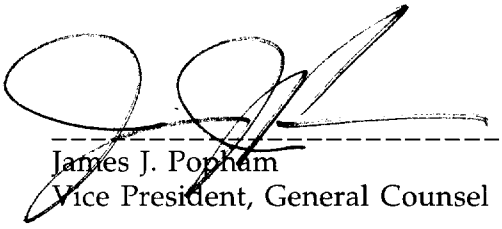
### ..... THE BAD

In the interest of ending on a positive note, INTV will refrain.

### .....AND THE UGLY

Ditto.

Respectfully submitted,



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